Supreme Court, U.S.
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No. 95-114

In The

Supreme Court of the United States

October Term, 1995

STUBBLEFIELD CONSTRUCTION CO. and
STUBBLEFIELD PROPERTIES,

Petitioners,

vs.

CITY OF SAN BERNARDINO,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeal Of California
Fourth Appellate District, Division Two

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a city violate the due process clause of the Fourteenth Amendment when its actions to defeat a proposed use of property are plainly arbitrary, irrational, and unrelated to any legitimate interest?

2. Must a property owner prove the existence of a "vested right" or other specific entitlement under state law in order to receive the protection of the due process clause of the Fourteenth Amendment?

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law firm that litigates in support of fundamental individual liberties, including the right to own and use private property. Our cases frequently pit ordinary individuals seeking to enjoy their basic rights against overzealous local regulators. We believe this case presents an issue of profound public and constitutional importance: whether substantive limits apply to government's power to regulate land use. Accordingly, we offer our views on why we believe the Court should grant the petition for writ of *certiorari*.

The Institute has received the consent of the parties for the filing of this brief and letters of consent have been filed with the Clerk.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW IN ORDER TO PROVIDE SUBSTANTIVE LIMITS ON WIDESPREAD ABUSES OF GOVERNMENT POWER WITH RESPECT TO THE USE OF PROPERTY.

The Petition paints a stark picture of an egregious abuse of individual rights: the manipulation of the zoning and planning process by government officials with the intent and effect of denying a property owner the opportunity to develop private property (Petition at 4-10 and A-5-12). The proposed apartment complex conformed to local standards and required no special variances, and therefore required only ministerial approval, which in

normal circumstances apparently would have been forthcoming. Instead, local officials willfully obstructed the development by singling out the proposed project for discriminatory treatment and by constantly changing the rules along the way to achieve the desired outcome. Following a 31-day trial, a state court jury found that the city's actions were not substantially related to a legitimate government interest and had damaged the plaintiffs in the amount of $11.54 million (Pet. at A-42-45). The California Court of Appeals reversed, finding that "[s]uch activities merely represent the democratic process at work" (Pet. at A-36 n. 19).

Two factors magnify the importance of this case. First, although the facts present a stark example of overzealous government regulation, the circumstances are not at all atypical. Second, in many jurisdictions property owners cannot obtain meaningful legal recourse against such actions, no matter how oppressive.

In recent years, government has grown at every level, but most explosively at the state and local levels. The largest growth has occurred in unelected boards and commissions that are not directly accountable to the public through democratic processes. See Bolick, *Grassroots Tyranny* 76-79 (1993). In many instances, these officials wield the machinery of local government in petty, arbitrary, and malicious ways that have the effect of denying individuals the basic right to own, use, and enjoy private property. See, e.g., Bolick at 111-121; Bovard, *Lost Rights* 17-38 (1994). See also *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Recourse to democratic processes in such

instances often is unavailing, not only because the officials are frequently unelected, but because the victims are usually individuals who bear alone the entire weight of the government's decision.

Not every instance of overzealous government regulation is unconstititional, of course, but nor is every government regulation constitutional. As the U.S. Court of Appeals for the Fifth Circuit observed in *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1044-46 (5th Cir. 1980), *rev'd in part and remanded*, 455 U.S. 283 (1982), *opinion extended*, 713 F.2d 137 (5th Cir. 1983),

> We certainly have no wish to challenge the legitimacy of many, even most of the statutes, ordinances and regulations issued by the innumerable legislatures and agencies in our modern and complex society. The era of *Lochner v. New York*, 198 U.S. 405 (1905), is happily long ended. Nevertheless, recognition of the multiple problems and needs of our contemporary world does not oblige us to discard the basic principles of constitutional government to which we have always been committed. . . .
>
> It is not the courts alone who are bound to respect these freedoms. Executives and legislatures, from the nation's capital to the smallest village, are called upon to respect, enforce and cherish these principles of liberty and personal autonomy.

The two principal constitutional protections against excessive government regulation of property are the takings clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment. Neither yet has been construed to fully protect individuals against the "play

and action of purely personal and arbitrary power," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), that it was a core purpose of the Fourteenth Amendment to prevent.

Although this Court has applied the Fifth Amendment to require compensation for regulatory takings, it has thus far limited such relief to instances where the full value of the property is diminished. See, e.g., *Lucas*, 112 S.Ct. at 2894. Moreover, the requirement of ripeness in the takings context means that a property owner must exhaust administrative remedies before obtaining redress. See, e.g., *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Ripeness can be thwarted by recalcitrant government officials by endlessly delaying "final" decisions or by creating new administrative hurdles. Even when redress for a taking is provided, the form is monetary compensation rather than injunction against wrongful government action.

Likewise, procedural due process protections are unvailing where, as here, the problem is not too little "process" but too much. Hence, substantive due process protections are necessary to prevent officials from "abusing governmental power, or employing it as an instrument of oppression." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). As the Ninth Circuit has observed,

> To be sure, governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power.

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1409 (9th Cir. 1989), *cert. denied sub nom. Doody v. Sinaloa Lake Owners Ass'n*, 494 U.S. 1016 (1990). Unlike takings claims, substantive due process actions are ripe when the abusive actions occur, see, e.g., 882 F.2d at 1402-04 and 1407; and do not require a showing that all use of the property is taken. See, e.g., *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988). Accordingly, substantive due process provides an important constitutional limitation on the ability of government officials to misuse their power and violate private property rights. Guidance by this Court is necessary to define the scope of this vital protection.

II. THE CIRCUITS ARE HOPELESSLY DIVIDED OVER THE STANDARDS APPLICABLE TO SUBSTANTIVE DUE PROCESS CLAIMS IN THE PROPERTY RIGHTS CONTEXT.

Perhaps no other question of constitutional law is in a greater state of cacophony than the parameters governing substantive due process claims in the property rights context. More specifically, the circuits are sharply divided, sometimes internally, over whether and under what circumstances a substantive due process claim can arise for denial of a development permit. As a consequence, it is impossible for individuals to know the extent of their rights or to effectively or consistently protect those rights. Similarly, government officials cannot comport their actions to due process standards if those standards are unknowable.

The court below ruled that no substantive due process claim can be stated unless government officials violate a "vested right" – in this case, a development permit (Pet. at A-23-26). The implication of this is that the denial of a permit – no matter how arbitrary – cannot give rise to a substantive due process claim. Hence, as here, even if a proposed project is consistent with then-applicable zoning standards and the property owner complies with all applicable requirements, government officials are free to single out the proposed project for adverse treatment and to change the rules and procedures even for malicious purposes. The more successful the Machiavellian machinations, the less likely the property owner will ever be able to challenge such actions.

Despite the fact that federal constitutional protections ostensibly are uniform, the legal standards and outcome in this case would vary markedly depending on the jurisdiction in which petitioners find themselves. The federal circuits divide generally into three widely divergent categories regarding substantive due process standards in the context of denials of development permits. Even within these categories there are nuances and exceptions, but the general categories are as described below.

The First Circuit, which was followed by the court below, has not recognized substantive due process claims in the context of zoning decisions and development permits, deferring completely to state law and processes. See, e.g., *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992).

The majority of circuits adhere to some form of the Second Circuit rule that to state a substantive due process claim, a property owner must show a property interest and that the government official acted arbitrarily and capriciously in denying the permit.* In *Brady v. Town of Colchester*, 863 F.2d 205, 213 (2nd Cir. 1988), the court required the plaintiffs to demonstrate a "legitimate claim of entitlement to the issuance of a license or certificate," in that "absent the alleged denial of due process, there is a certainty or a very strong likelihood that the application would have been granted." See also *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989); *Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990) (also requiring a showing that state law remedies are inadequate or that some other federal constitutional right also has been violated); *D.C.A. Dev. Corp. v. Ogden City Mun. Corp.*, 965 F.2d 827 (10th Cir. 1992); *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374 (11th Cir. 1994) (applying equitable estoppel to the city's actions). Depending on the precise test applied by these circuits, the plaintiffs here likely would have stated a substantive due process cause of action.

Finally, the Third and Ninth Circuits focus on the actions of the government officials to determine whether denial of a proposed land use was arbitrary or malicious.

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* The Eighth Circuit apparently is torn between the First and Second Circuits' approaches. *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992).

This standard is met if, as here, the denial was for reasons unrelated to the merits of the application. See, e.g., *Bello v. Walker*, 840 F.2d 1124 (3rd Cir. 1988); *Blanche Rd. Corp. v. Bensalem Twp.*, 57 F.3d 253 (3rd Cir. 1995); *Sinaloa Lake, supra*; *Bateson v. Geisse, supra*. This approach provides the greatest protection for property rights, for it assumes that property owners acting within established legal parameters may freely use and enjoy their property unless some legitimate police power justification exists to prevent such use.

Plainly, the courts are hampered by "the lack of guidance from the Supreme Court for the proper analysis of a claim alleging a substantive due process right regarding property interests." *Holskin v. City of Chicago*, 29 F.3d 1145, 1148-49 (7th Cir. 1994). We urge the Court to give greater definition and protection to private property rights by reviewing this case and providing definitive guidance on the important legal issues presented.

CONCLUSION

This case concerns essential individual liberties and issues of widespread public importance, on which the lower courts are divided and jurisprudence is muddled. For these reasons, the Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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